

Before the
COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Cingular Wireless and NextWave)
Seek FCC Consent for the Full and) WT Docket No. 03-217
Partial Assignment of Thirty-Four)
Broadband Personal Communications)
Services Licenses)

To: The Wireless Telecommunications Bureau

REPLY TO OPPOSITIONS TO PETITION TO DENY

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SUMMARY

In this Reply, Petitioners Eldorado Communications and NY Telecom rebut Applicants NextWave and Cingular's arguments in opposition to Petitioners' Petition to Deny. Specifically, Petitioners demonstrate that there are no obstacles to their participation in this proceeding, as they have standing and have complied with the procedural requirements of the Commission's rules. Petitioners further demonstrate, contrary to Applicants' claims, that depriving the public of funds otherwise due and transferring designated entity spectrum to a large wireless carrier is not consistent with the public interest. Finally, Petitioners demonstrate that Applicants' proffered justifications for waiver, including NextWave's bankruptcy, provide no basis for waiving the Commission's unjust enrichment rules.

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Eldorado Communications, LLC ("Eldorado") and NY Telecom, LLC ("NY Telecom")¹ (collectively, "Petitioners"), by their attorneys and pursuant to Section 309(d) of the Communications Act and Section 1.939 of the Commission's rules, hereby reply to NextWave Personal Communications Inc., NextWave Power Partners Inc. (collectively, "NextWave"), and Cingular Wireless LLC's ("Cingular," and collectively with NextWave, "Applicants") respective Oppositions to Petitioners' Petition to Deny the Applicants' joint applications (the "Applications") to assign thirty-four Broadband Personal Communications Services Licenses.

In their Petition, Petitioners demonstrated that the grant of the challenged Applications would not serve the public interest and that Applicants had failed to justify their requested waiver. In Opposition, Applicants raise procedural objections to Petitioner's participation in this proceeding and repeat their assertions that depriving the public of funds due and transferring designated entity spectrum to a large wireless carrier is consistent with the

¹ As detailed in their Petition to Deny, Eldorado and NY Telecom have previously participated in related proceedings.

public interest and warrants a waiver of the Commission's unjust enrichment rules. As demonstrated below, however, Petitioners have complied with all applicable procedural requirements, the proposed transfers would not serve the public interest, and the standard for waiver has not been met.

I. PETITIONERS HAVE SATISFIED THE COMMISSION'S PROCEDURAL REQUIREMENTS.

As an initial matter, Applicants rely on procedural arguments to preclude consideration of Petitioners' arguments on the merits. Specifically, Applicants argue that Petitioners failed to support their Petition with an adequate affidavit, and contend that Petitioners lack standing. Neither of these challenges has merit.

A. Petitioners' Factual Allegations Are Part of the Public Record, and Require No Supporting Affidavit.

Petitioners have complied fully with Section 1.939(d), which provides that petitions to deny must include "specific allegations of fact sufficient to make a *prima facie* showing that the petitioner is a party in interest and that a grant of the application would be inconsistent with the public interest."² An affidavit is required only when a petitioner relies on facts of which official notice may not be taken.³ That is not the case here. Petitioners rely on facts that are part of both the Commission's and the courts' public records, and no affidavit in support of these facts is required.⁴ NextWave's own pleading confirms this conclusion, characterizing the history of NextWave's licenses as

² 47 C.F.R. § 1.937(d).

³ *Id.*

⁴ See, e.g., *Application of Mobex Network Services, LLC for Modification of the Licenses for Automated Maritime Telecommunications System Call Sign WHV733*, Order, 18 FCC Rcd 12305 at ¶5 n.16 (WTB 2003) (stating no affidavit is required when the Commission can take official notice of "operative facts"); see also *Channel 32 Hispanic Broadcasters, Ltd., Pueblo, Colorado*, Order, 15 FCC Rcd 22649 at ¶9 (2000) (stating Communications Act does not require affidavit where facts alleged are independently supported by Commission records).

"universally understood."⁵ It is noteworthy, moreover, that both NextWave and Cingular likewise failed to provide affidavits, despite the parallel requirement that factual allegations contained in oppositions (other than those of which official notice may be taken) be supported by affidavit.⁶

B. Petitioners Have Standing.

As demonstrated in their Petition, Petitioners have standing to challenge the Applications. Applicants' arguments to the contrary disregard Petitioners' pending Application for Review of the Commission's tolling decision,⁷ their interest in a reauction of NextWave's licenses pursuant to the Commission's rules, and the relationship between Eldorado and NY Telecom.

First, Applicants assert that denial of the applications will leave the spectrum at issue with NextWave, a claim that disregards the potential effect of NY Telecom's pending Application for Review. In that Application, NY Telecom specifically seeks revocation and reauction of the licenses at issue in this proceeding. As demonstrated in its Petition, NY Telecom is ready, willing, and able to bid in any reauction of NextWave's improperly tolled licenses.

Applicants attempt to counter NY Telecom's showing by asserting that NY Telecom was free to bid for the subject licenses in the bankruptcy process. But such bidding was not subject to the Communications Act or the Commission's rules, both of which include specific provisions designed to enable small businesses like NY Telecom to compete for spectrum. Congress has directed the Commission, in auctioning spectrum, to "ensure that small businesses . . . are given the opportunity to participate in the provision of

⁵ NextWave Opposition at 12.

⁶ 47 C.F.R. § 1.939(f).

⁷ NY Telecom Application for Review, File Nos. 000855872, *et al.* (filed April 2, 2003)

spectrum-based services.”⁸ With respect to PCS licenses, including those at issue here, the Commission has implemented this mandate by restricting eligibility for some C and F block licenses to “entrepreneurs” – businesses that satisfy certain asset and revenue caps.⁹ For licenses that are not subject to such eligibility restrictions, the Commission provides bidding credits for small and very small businesses.¹⁰ By its Petition to Deny, and its Application for Review of the Commission’s decision tolling NextWave’s construction deadlines, NY Telecom seeks an opportunity to compete fairly for NextWave’s licenses. The Bankruptcy auction afforded NY Telecom no such opportunity.

For similar reasons, Applicants’ reliance on *Ranger Cellular* is misplaced.¹¹ Appellants in that case had applied for cellular licenses in eight Rural Service Areas. At the time of appellants’ applications, the licenses at issue were awarded by lottery. Appellants lost the lotteries for the challenged licenses. Subsequently, Congress terminated the Commission’s authority to use lotteries in most cases, and required, instead, that licenses be awarded through competitive bidding. In their challenge, appellants argued that their injury would be redressed by vacating the award of the challenged licenses and reassigning those licenses by an auction limited to bidders that had originally applied for the lotteries. The D.C. Circuit concluded that appellants’ injury was not redressable because the requested remedy was inconsistent with existing Commission policy, which would dictate an open auction.¹² Moreover, appellants in *Ranger Cellular* conceded that an open auction would “as a practical matter make it impossible for the original applicants to compete.”¹³

⁸ 47 U.S.C. § 309(j).

⁹ 47 C.F.R. § 24.709.

¹⁰ 47 C.F.R. § 24.712; 47 C.F.R. § 24.717.

¹¹ *Ranger Cellular v. FCC*, 2003 U.S. App. LEXIS 23224 (D.C. Cir.).

¹² *Id.* at *14-*15.

¹³ *Id.* at *14.

By contrast, Petitioners seek an auction pursuant to the Commission's rules governing C and F block PCS licenses, which provide for closed bidding and bidding credits to enable small businesses to compete for spectrum. By definition, closed bidding would allow smaller entities a fair opportunity to compete for the licenses, and, as the Commission has documented, bidding credits would likewise level the playing field.¹⁴ *Ranger Cellular*, consequently, does not call NY Telecom's standing into question.

Applicants' remaining standing arguments are also unfounded. Contrary to NextWave's contention, NY Telecom presents more than a "generalized desire to bid on spectrum." NY Telecom, instead, has expressed its desire to bid on the particular spectrum at issue in this proceeding, an assertion based on a review of the licenses at issue.¹⁵

Similarly, Cingular's assertion that *High Plains*¹⁶ merely allows disappointed bidders to challenge long-form applications of winning bidders is contradicted by the D.C. Circuit's decision in *U.S. Airwaves*.¹⁷ In that decision, the D.C. Circuit concluded that disappointed bidders had standing to challenge post-auction rule changes, not long-form applications. Just as the disappointed bidders in *U.S. Airwaves* had standing to challenge the Commission's post-auction changes to the financing rules applicable to winning bidders, Eldorado has standing to challenge the Commission's consideration of NextWave and Cingular's post-auction request to relieve NextWave of debts incurred in an auction in which Eldorado was a qualified bidder.

¹⁴ The Commission has noted that in "open Commission auctions with small business bidding credits, a total of 79 percent of all winning bidders have been small businesses using a bidding credit." *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses*, Sixth Report and Order and Order on Reconsideration, 15 FCC Rcd 16266 at par22 n.67 (2000).

¹⁵ See Second Declaration of Stephen Roberts (attached as Exhibit 1).

¹⁶ *High Plains Wireless, L.P. v. FCC*, 276 F.3d 599 (D.C. Cir. 2002)

¹⁷ *U.S. Airwaves, Inc. v. FCC*, 232 F.3d 227 (D.C. Cir. 2000).

Cingular's attempt to distinguish *High Plains* on the ground that NY Telecom was not qualified to bid in the auctions in which NextWave acquired its spectrum is also unavailing. As demonstrated in the Petition, Eldorado was qualified to bid in Auction No. 5, and bid against NextWave for three of the licenses at issue in this proceeding. For purposes of standing, because there is an identity of interest between Eldorado and NY Telecom,¹⁸ the Commission must consider their histories in conjunction.

In any event, all of the arguments against standing raised by Applicants overlook Eldorado and NY Telecom's interests in the fair and evenhanded application of the Commission's designated entity preference programs. Both NY Telecom and Eldorado are entities that these programs are designed to benefit, and necessarily have an interest in ensuring that these programs are applied to benefit genuinely small businesses. The actions requested by Applicants, by contrast, would undermine the Commission's small business preference programs by perpetuating the favorable treatment of NextWave and allowing Cingular to acquire spectrum that was set aside for entrepreneurs. Furthermore, as disappointed competitors, both NY Telecom and Eldorado have been injured by the Commission's disparate treatment of NextWave, and will be further injured if the transfer of spectrum originally set aside for designated entities is allowed to go forward.

II. THE CHALLENGED TRANSACTIONS ARE NOT IN THE PUBLIC INTEREST.

Granting the Applications would not be in the public interest. Instead, it would undermine the integrity of the Commission's auction process, designated entity preferences, and unjust enrichment rules. In arguing to the contrary, Applicants repeatedly cite NextWave's bankruptcy as providing a public interest basis for approving the instant applications. That argument must fail – the Commission's duty to forward the underlying purposes of the bankruptcy

¹⁸ Certain of NY Telecom partners have an interest in Eldorado.

laws (assuming, *arguendo*, that consummation of this sale is necessary to those purposes) cannot outweigh its duty to forward the underlying purposes of its governing statutes and regulations.

Moreover, the Supreme Court's decision invalidating the Commission's cancellation of NextWave's licenses does not excuse NextWave's compliance with the Commission's otherwise applicable regulatory requirements. That decision merely provides that a particular regulatory action – revoking NextWave's licenses for nonpayment – is forbidden by the bankruptcy laws.¹⁹ Furthermore, the decision makes it plain that the Commission could, consistent with the bankruptcy laws, seek enforcement of its security interest in the licenses at issue.²⁰ Had the Commission done so, rather than accepting payment of less than Applicants owe, the spectrum would have been subject to reauction pursuant to the Commission's rules – which include provisions enabling small businesses like Petitioners to compete fairly for spectrum – not the Bankruptcy Court's. By contrast, if the Applications are approved, the spectrum will be transferred not to an entrepreneur or other small business, but to one of the largest wireless carriers in the country.

In any event, as a matter of basic fairness, the Commission should reject Applicants' arguments that NextWave's bankruptcy somehow justifies approval of the Applications. NextWave became insolvent as a result of its decision to bid exorbitant prices for an excess of spectrum, a decision that caused considerable harm to its fellow auction participants. NextWave was unwilling to suffer the consequences of this conduct, however, and refused to pay for its licenses or to comply with the Commission's alternatives. After this extraordinary course of conduct, which wreaked havoc on the Commission's auction processes and the fortunes of its fellow bidders, NextWave now asserts that its bankruptcy provides a basis for further excusing NextWave from its

¹⁹ *FCC v. NextWave Personal Communications Inc.*, 537 U.S. 293, 307-08 (2003).

²⁰ *Id.* at 307.

obligations to the Commission. This damaging course of conduct does not justify special treatment for NextWave. Instead, NextWave's bankruptcy counsels against the approval of the Applications, which would unfairly reward NextWave and deprive small businesses of the opportunity to compete for NextWave's spectrum.

III. WAIVER OF THE COMMISSION'S UNJUST ENRICHMENT RULES IS NOT WARRANTED.

Applicants initially argue that a payment of less than the amount owed for the spectrum at issue somehow does not require a waiver. This argument, which would render the unjust enrichment rules superfluous, warrants no response. Indeed, the Commission's own request for information makes clear that the Applicants have provided inadequate justification for this novel position.²¹ If Applicants are to be relieved of their obligations under the Commission's unjust enrichment rules, waiver is undoubtedly required.

Applicants have not, however, satisfied the Commission's requirements for waiver. In their Opposition, once again, Applicants assert that NextWave's bankruptcy somehow justifies waiver of the generally applicable unjust enrichment rules. The Commission has made clear, however, that bankruptcy proceedings and application of the unjust enrichment provisions are not incompatible.²² Moreover, granting waiver on the basis of NextWave's bankruptcy would be profoundly unjust to those competing bidders that, unlike NextWave, have made every effort to comply with the Commission's rules and have suffered accordingly.

²¹ See Letter from Katherine M. Harris, Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau, to Michael R. Wack, NextWave Personal Communications Inc. and NextWave Power Partners, and David G. Richards, Cingular Wireless LLC (Nov. 12, 2003).

²² *Winstar LMDS, LLC Request for Waiver of 1.211(d) and 101.1107(e) of the Commission's Rules Regarding Unjust Enrichment Payment for Fifteen LMDS Licenses Purchased in Auction No. 17*, Order, 17 FCC Rcd 7084, 7090 (WTB 2002).

Furthermore, if the applications are granted and the transfer is allowed, NextWave will already have received a substantial benefit from the Commission as a result of its bankruptcy – a payment of \$686 million for the licenses. In view of this concession on the Commission’s part, there is no basis for waiving the unjust enrichment rules. As explained by the Supreme Court, the Commission could have sought to enforce its security interests in NextWave’s licenses rather than allowing NextWave to profit from their sale.²³ In addition to capturing the entire current market value of the licenses for the public (rather than allowing NextWave to receive nearly half of that value), this course of conduct would have enabled an auction pursuant to the Commission’s auction rules, which are designed to maximize spectrum value and enable small businesses a fair opportunity to compete for spectrum. In light of the financial and policy benefits the Commission will forego if the Applications are granted and the Commission does not reauction the spectrum, there is no basis for the Commission to sacrifice further by waiving its unjust enrichment rules.

NextWave also argues that waiver is warranted because it met its five-year build-out requirements. But satisfying the five-year build-out requirement, which enables transfer of restricted licenses to non-entrepreneurs like Cingular, does not warrant waiver of the unjust enrichment rules, which are meant to ensure that large businesses like Cingular do not benefit from the Commission’s preference policies. The Commission has determined that restricted licenses may be transferred to non-entrepreneurs when the five-year build out requirement is satisfied, but has not excused unjust enrichment on that basis.²⁴ Giving special consideration here would be particularly inappropriate, as NextWave’s alleged construction apparently has not resulted in actual service to the public. In short, NextWave cannot rely on its satisfaction

²³ *NextWave*, 537 U.S. at 307-08.

²⁴ See 47 C.F.R. § 24.839.

of a requirement that is necessary to the requested transaction to justify waiver of the separate unjust enrichment rules.

In any event, this justification for the requested waiver is contingent on NextWave and the Commission's ability to successfully defend the Commission's decision to "toll" NextWave's construction deadlines. If, as Petitioners anticipate, that decision is ultimately invalidated, this asserted basis for waiver will disappear.

Cingular contends that because waiver of the Commission's unjust enrichment rules may be warranted in some instances, waiver is somehow justified here. But that argument does nothing to get Applicants over the "high hurdle" presented by a waiver request, which requires an affirmative showing that the Commission's well-defined waiver requirements have been met.²⁵

Likewise, Cingular's contentions that the purpose of the unjust enrichment rules would not be undermined by the challenged Applications depend on tricks of language that defy common sense and Commission precedent. First, Cingular argues that grant of the waiver would not enable NextWave to profit because disposition of the challenged payment lies with the Bankruptcy Court. But the Commission has rejected such a cramped reading of the word profit, explaining that "in calculating an unjust enrichment payment, the Commission does not take into consideration the amount of profit or loss a licensee incurs when selling its assets. Rather, the Commission looks toward the benefit initially received by the licensee at the time the spectrum was auctioned."²⁶ NextWave received the benefit of installment payments from the Commission, and it is incumbent on the Commission to ensure that NextWave surrender that benefit as a condition of the requested transfers.

²⁵ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969); 47 C.F.R. §1.925.

²⁶ *Winstar* at ¶12.


Finally, Cingular's contention that it is not receiving a "discount" on the relevant spectrum because it was not outbid in the Bankruptcy Court stretches reason. There can be no dispute that NextWave and Cingular will collectively pay less for the licenses than NextWave's commitments to the Commission and the Commission's rules would otherwise require. Thus, both Cingular and NextWave are receiving a discount on NextWave's originally-bid price for the spectrum at issue. By any measure, this is a discount, and one that will benefit both Cingular and NextWave at the expense of the public.

IV. CONCLUSION

Applicants have not demonstrated that grant of their Applications would serve the public interest, much less justify a waiver of the Commission's unjust enrichment rules. Because a grant of the Applications would deprive the public of funds otherwise due, harm competition by perpetuating the favorable treatment of NextWave, and undermine the Commission's unjust enrichment rules and small business preference programs, the Applications should be denied.

Respectfully submitted,

ELDORADO COMMUNICATIONS, LLC
and NY TELECOM, LLC

A handwritten signature in black ink, appearing to read "H. Goldberg", written over a horizontal line.

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November 24, 2003

EXHIBIT 1


SECOND DECLARATION OF STEPHEN ROBERTS

1. My name is Stephen Roberts, and I am Managing Director of NY Telecom, LLC ("NY Telecom").

2. As stated in Eldorado Communications, LLC and NY Telecom's Reply to Oppositions to Petition to Deny, NY Telecom's interest in bidding in spectrum at issue in this proceeding is based on a review of the licenses at issue.

I hereby declare under penalty of perjury that foregoing is true and correct to the best of my knowledge.

Date: 11/24/03



Stephen Roberts

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing "Reply to Oppositions to Petition to Deny" was sent by first-class mail, postage prepaid, this 24th day of November, 2003, to each of the following:

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